IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS. 19 OF 2003 AND 12 OF 2004

CRIMINAL APPEAL NO. 19 OF 2003

1. Ibrahim Shaikh(Orig. Accused No. 2.)

2. Santosh Dhawre(Orig. Accused No. 3)

3. Shivaji Chawan(Orig. Accused No. 6),
presently at Central Jail, Aguada, Goa. ... Appellants

versus

State of Goa,
through the Public Prosecutor. ... Respondent

CRIMINAL APPEAL NO. 12 OF 2004

Shri Satish P. Dessai,
resident of Avanti Nagar, Tisk,
Usgao-Goa. ... Appellants

versus

State, through Public Prosecutor,
High Court of Bombay, Goa Bench,
Goa. ... Respondent

Mr. D. Pangam, Advocate for the Appellants under Legal Aid Scheme in both the Appeals.

Mr. S. N. Sardessai, Public Prosecutor for the Respondents in both the Appeals.

CORAM : V. M. KANADE, J.

DATE : 8TH JUNE, 2005.

ORAL JUDGMENT

The appellants are convicted by the IInd Additional Sessions Judge, Panaji, in S.C. Case No. 37/2000 for offence punishable under Section 395 of the Indian Penal Code and are sentenced to suffer Rigorous Imprisonment for a period of six years and to pay a fine of Rs.5000/-, in default to suffer Rigorous Imprisonment for a further period of one month. The appellants are original accused nos. 2 and 4. Being aggrieved by the Judgment and Order of the IInd Additional Sessions Judge, Panaji, the prosecution case in brief is that on 18-3-2000 between 00.30 hours to 2.30 hours the accused entered the house of the complainant and committed dacoity after tying the hands and legs of the occupants of the house and ran away after taking the gold ornaments and cash worth Rs.1,46,000/-. A complaint was lodged in the morning at 5.30 a.m. and an offence was registered against 8 unknown persons. The accused were thereafter

arrested. The Investigating Officer recorded the statement of the witnesses. Recovery of Rs.19,000/- and gold ornaments of some of the accused was recovered. Similarly a gupti which was used in the commission of the offence was recovered by accused no. 2. Test Identification Parade was held in which the eye witnesses identified the accused. A charge-sheet was filed against the accused. The Sessions Judge framed charge against the accused who pleaded that they had not committed the said offence. The trial Court on the basis of the evidence adduced by the prosecution convicted the accused under Section 395 of the Indian Penal Code.

2. Original accused nos. 3 and 5 had filed a Criminal Appeal separately which was heard by this Court and this Court was pleased to confirm the Judgment and Order of the trial Court. Against the said Judgment and Order passed by this Court against accused nos. 3 and 5 they have preferred a Special Leave of the Order of the Supreme Court. The present appeals were filed separately and, therefore, both the appeals could not be heard together.

3. I have heard the learned Counsel appearing on behalf of the appellants and the learned Public Prosecutor appearing on behalf of the State at length. The learned Counsel appearing on behalf of the appellants has taken me through the evidence adduced by the prosecution as also the

Judgment and Order of the trial Court. The learned Counsel appearing on behalf of the appellants submitted that the eye witnesses which have been examined by the prosecution, namely, P.W.1, Sadashiv Vishnu Prabhu Tendulkar, P.W.2, Somnath Dabolkar, P.W.3, Shalini Tendulkar and P.W.5, Prakash Gaonkar have made material improvements in their evidence in respect of a very important fact and on this ground intself their testimony is liable to be discarded. The learned Counsel submitted that all these witnesses have submitted that P.W.1, Tendulkar, P.W.2, Dabolkar and P.W.3, Shalini Tendulkar have stated in their evidence that all the accused persons had covered their faces with masks which after some time were partially lowered during the course of dacoity and, therefore, they had an occasion to see the face of all the accused. The learned Counsel submitted that this fact was conspicously absent when their statement was recorded by the Investigating Officer. He submitted that this fact was brought to the notice of the witnesses. They could not give any plausible explanation as to why this fact did not appear in the statement which was recorded by the Police. He, therefore, submitted that the testimony of these witnesses could not be relied upon for the purpose of coming to the conclusion that the accused nos. 2 and 4 were present appellants herein and were also present when the said offence was committed. The learned Counsel thereafter submitted that the Test Identification Parade was also not held in accordance with the guidelines which have been framed pursuant to the

directions which have been given by this Hon'ble Court and, therefore, the Test Identification Parade itself cannot be relied upon. He further submitted that before the Test Identification Parade was held, accused no. 2 was taken to the house of the complainant and the gupti was recovered at this instance from the house. He submitted that the Investigating Officer and the panch witness have stated in their evidence that when accused no. 2 was taken to the house his face was not covered and he was seen by P.W.1, Sadashiv Tendulkar and the other occupants of the house. He submitted that, therefore, the entire exercise of holding a Test Identification Parade was merely a farce. The accused no. 2 was seen by the witnesses before the Test Identification Parade was held. He also submitted that in the evidence of the Mamlatdar who held the Test Identification Parade it could be seen that at the site and place where the Test Identification Parade was held Police Officers were present and, therefore, a serious doubt is raised regarding the authenticity of the Test Identification Parade. The learned Counsel appearing on behalf of the appellants further submitted that the Investigating Officer also admitted in his evidence that P.W.1, Sadashiv Tendulkar, P.W.2, Somnath Dabolkar and P.W.3, Shalini Tendulkar have not stated to the Police Officer that the mask which was worn by the accused was lowered during the course of the dacoity. It is, therefore, submitted that the prosecution had not proved the case beyond reasonable doubt and the accused were entitled to be acquitted. It is

submitted that the trial Court had not appreciated the evidence in its proper perspective and, therefore, the finding of the trial Court was to be set aside.

4. Mr. S. N. Sardessai, the learned Public Prosecutor appearing on behalf of the State has opposed the submissions raised by the learned Counsel appearing on behalf of the appellants. It is submitted that this Court in the appeal filed by original accused nos. 3 and 5 had confirmed the Judgment and Order of the trial Court and had convicted them for having committed the said offence. It is submitted that the position of the present appeals was identical and, therefore, the Judgment and Order of the trial Court was liable to be confirmed in view of the Judgment and Order passed by this Court in the companion appeal. He further submitted that merely because there were certain improvements in the statement of the witnesses the entire testimony was not liable to be discarded on that count. It is submitted that the Supreme Court on more than one occasion had observed that very often witnesses have a tendency to exaggerate things and in their enthusiasm though very often makes slight improvements in their testimony and he submitted, therefore, merely because there was an omission on the part of the witnesses in stating that the mask had been lowered during the course of the robbery that was not sufficient enough to discard their testimony. He submitted that all the eye witnesses had given a true and faithful account regarding the incident which had transpired on 18-3-2000

and these witnesses had identified the accused in the Court as also in the Test Identification Parade which was held. It is submitted that though some of the eye witnesses had not identified either accused no. 2 or accused no. 4 yet other witnesses had identified either of them and, therefore, there was sufficient corroboration in the evidence of these eye witnesses. It is submitted that there was a recovery of the money and gold articles at the instance of the accused. The presence of the accused was clearly established in view of the eye witnesses account given by P.W.1, Sadashiv Tendulkar, P.W.2, Somnath Dabolkar, P.W.3, Shalini Tendulkar and P.W.5, Prakash Gaonkar. It is submitted that for the purpose of convicting an accused for the offence of dacoity as defined under Section 391 of the Indian Penal Code, it was not essential that each and every person should commit a particular offence in furtherance of the said dacoity and even if a person is present and abates the commission of the offence is equally liable for having committed the said offence. The learned Public Prosecutor submitted that since this Court has already convicted accused nos. 3 and 5 and have accepted the testimony of the eye witnesses there was no reason why the testimony of the eye witnesses should not be accepted in the case of the present Appellant. He further submitted that the Supreme Court had in a number of cases held that if the accused are identified in the Court by the eye witnesses and clear and cogent evidence is given by them in that case even if a Test Identification Parade is not held even then the accused

are liable to be convicted on the basis of the evidence of the eye witnesses and the identification of the accused by the eye witnesses in the Court. It is submitted that in the present case the prosecution had also held Test Identification Parade on 10-4-2000 and the Investigating Officer had given sufficient explanation as to why the Test Identification Parade was not diligently held. It is submitted that, therefore, the conviction should be confirmed by this Court.

5. It is no doubt true that this Court in the companion appeal has convicted original accused nos.3 and 5. However, so far as the present appellant nos.2 and 4 are concerned from the evidence on record a distinction can be drawn in respect of the evidence against these two witnesses. It can be seen from the evidence of P.W.1, Sadashiv Tendulkar, that in his evidence he has stated that he could not identify accused no.4. Further, he has stated in his evidence that he had seen accused nos.2 and 4 as the cloth which was on the face of the accused had come down during the course of the dacoity. P.W.2, Somnath Dabolkar also has given a similar version in her examination-in-chief. P.W.2, Dabolkar, did not identify accused no.2. P.W.3, Shalini Tendulkar could not identify accused no.4 in the Test Idntification Parade and P.W.5, Prakash Gaonkar has stated in his evidence that he had seen accused no.2 before the test Identification Parade was held. In my view, there is a clear improvement in the evidence of

P.W.1, Sadashiv Tendulkar, P.W.2, Somnath Dabolkar and P.W.3, Shalini Tendulkar. Ordinarily, if the witnesses had seen the faces of the accused they would have immediately mentioned this fact to the Police Officer. P.W.3, Shalini Tendulkar in her evidence has stated that she had seen accused nos.2 and 4 before the date of the incident. However, this fact was not informed by her to the Police. Further, in the previous statement which was recorded by the Investigating Officer all these witnesses have not given any description of the accused apart from giving the description of their clothes. Thus, it is not possible to accept the version given by these eye witnesses that they had an occasion to see the face of the accused during the course of the dacoity. The version given by them that they could see the accused since their masks were lowered is obviously an afterthought.

6. Since there was no occasion for the eye witnesses to see the face of the accused there was no question of identifying the present appellants in the Test Identifiction Parade. There is another serious lacuna in the prosecution case. P.W.7, Paresh Prabhu, is a panch witness who has stated in his evidence that accused no.2 had shown the place where he had kept the gupti which was used in the commission of the offence. He has stated that accused no.2 had been taken to the complainant's house and was shown the place where the gupti was concealed below the mattresses. He has stated that at that time the face of accused no.2 was not covered and

P.W.1, Sadashiv Tendulkar and other occupants were present in the house when accused no.2 was taken to the house of the complainant. Firstly, it is difficult to imagine that after the commission of the offence, the accused would keep the gupti which was used in the dacoity in the complainant's house itself. Secondly, this also establishes the fact that before the Test Identification Parade was held all the witnesses had an opportunity to see accused no.2. In view of this evidence which has been reiterated by the Investigating Officer, no reliance can be placed on the Test Identification Parade which has been held subsequently. Further, the Mamlatdar who held the Test Identification Parade when he was cross-examined by the learned Counsel appearing on behalf of the accused no.4 has admitted that Police were present at the site where the Test Identification Parade was held. This version which is given by the Mamlatdar who held the Test Identification Parade completely vitiates the evidence regarding the Test Identification Parade.

7. So far as the accused are concerned, no recovery has been made at the instance of accused no.4 and so far as accused no.2 is concerned only a gupti is recovered. As stated hereinabove, it is difficult to accept this evidence of recovery of gupti at the instance of accused no.2.

8. Further, in the evidence of the Investigating Officer, P.W.12, Jaiprakash Nagvenkar, it can be seen that no explanation has been offered regarding the manner and place where the accused were arrested. No Arrest Panchanama has been prepared by the Investigating Officer. The incident in question took place on 18-3-2000 in the early hours of the morning. Accused Nos.1 to 4 were arrested on the next day i.e. on 19-3-2000. The other accused were arrested on 20-3-2000. The Investigating Officer has not stated in his evidence as to how and in what manner the accused nos.1 to 4 were arrested. Thus, it creates doubt regarding the identity of the present appellants. In my view, therefore, the appellants are entitled to be given the benefit of doubt and as the prosecution has failed beyond the reasonable doubt that the present appellants no.2 and 4 were present at the time when the said offence was committed in the house of the complainant the findings recorded by the trial Court in respect of the present appellants, therefore, are liable to be set aside.

8. In the result, both the appeals are allowed. The Judgment and Order of the trial Court is set aside. The appellants are acquitted of the offence with which there were charged. The appellant/original accused no.4 is on bail. His bail bond shall stand cancelled. The original accused no. 2 though he was released on bail by Order of this Court yet he could not

furnish surety and, therefore, has continued to remain in Jail. Accused No.2 to be released forthwith unless he is required in any other case.

V. M. KANADE, J.

RD.